SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Assoun*, 2019 NSSC 220

Date: 20190712
Docket: CRH 149825
Registry: Halifax

Between:

Her Majesty the Queen

v.

Glen Eugene Assoun

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	July 2, 2019, in Halifax, Nova Scotia
Final Written Submissions:	July 5, 2019
Written Decision:	July 12, 2019
Counsel:	David G. Coles, Q.C. for the Applicants, Canadian Broadcasting Corporation, The Canadian Press and The Halifax Examiner Philip Campbell and Sean MacDonald, for the Respondent, Glen Eugene Assoun Patricia MacPhee and Sarah Drodge, for the Respondent, the Attorney General of Canada Marian V. Fortune-Stone, Q.C. and Mark Scott, Q.C., for the Respondent, the Nova Scotia Public Prosecution Service Duncan Read, for the Intervenor, Halifax Regional Municipality

By the Court:

INTRODUCTION

[1] On September 17, 1999, Glen Eugene Assoun (Mr. Assoun) was convicted by a jury of the second-degree murder of Brenda Way. On December 17, 1999, Justice Hood sentenced Mr. Assoun to life imprisonment with no parole eligibility for 18.5 years. On January 17, 2006, the Nova Scotia Court of Appeal heard and subsequently dismissed Mr. Assoun's appeal. Leave to Appeal to the Supreme Court of Canada was denied on September 14, 2006. On April 18, 2013, the Association in Defence of the Wrongly Convicted (now known as Innocence Canada) filed an Application for a Ministerial review under Part XXI.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The Minister of Justice's Criminal Conviction Review Group (CCRG) prepared a Preliminary Assessment (PA) on August 29, 2014 and provided the PA (with 131 appendices) to counsel for Mr. Assoun and to counsel for the Nova Scotia Public Prosecution Service (PPS). The PA was provided by way of an undertaking that it would be kept confidential. The author of the PA, Department of Justice lawyer Mark Green, concluded:

> … I am of the view that on the basis of all this information, including the new and significant information that has been submitted with your application, there may be a reasonable basis to conclude that a miscarriage of justice likely occurred in your case. Therefore, your application will advance to the Investigation stage of the criminal conviction review process.

[3] On September 12, 2014, Mr. Assoun made Application to the Court for judicial interim release. On September 26, the Attorney General of Canada (AGC) filed a Notice of Application for a sealing order and publication ban. The AGC sought an Order:

1. Sealing the PA, including its appendices, which the Applicant wishes to file and rely upon in support of his application for judicial interim release.
2. Banning the publication of any information emanating from the judicial interim release proceedings that would reveal the content of the preliminary assessment and its appendices.
3. The Attorney General requests that the sealing order and publication ban remain in place until the competition of the Ministerial review

process under s. 696.1 of the *Criminal Code* and any subsequent judicial proceedings.

[4] On September 29, 2014, the Courts' Communications Director provided email Notice to the media advising of the pending Application for a publication ban and sealing order. On October 2, 2014, the Canadian Broadcasting Corporation (CBC) advised of its intention to intervene and oppose the Application. On October 3, the PPS filed it response, proposing an Order that:

1. The testimonial, documentary and physical evidence on the hearing of the application of Glen Eugene Assoun for judicial interim release, as well as the representations of the parties and the reasons of the Court for its decision, shall not be published, broadcast or transmitted in any way or form, until the conclusion of the Ministerial review and any judicial proceedings arising therefrom;
2. All documents, filings, physical evidence and materials submitted for and on the said Application for judicial interim release shall be sealed from public view until the conclusion of the Ministerial review and any judicial proceedings arising therefrom; and
3. This Order shall remain in full force and effect unless varied by a Court of competent jurisdiction.

[5] On October 7, the Court was provided with a copy of the PA and its 131 appendices by counsel for the AGC. On the hearing of the Application for a sealing order and publication ban, Mr. Assoun sought a publication ban on the bail hearing. Mr. Assoun was in agreement with the publication ban and sealing order as sought by the PPS.

[6] In reaching my decision (*R. v. Assoun*, 2014 NSSC 381), I stated at para. 55:

> [55] … I find that the PA and Green affidavit, taken together, form solid evidence that there is a real and substantial risk which poses a serious threat to the proper administration of justice such that the publication ban and sealing order are the only ways to prevent a serious danger from being avoided.

[7] On October 23, 2014 the Order was issued. Mr. Assoun was granted bail and the conditions were subsequently amended.

[8] After a long delay, on March 1, 2019, the federal Minister of Justice directed that Mr. Assoun should have a new trial pursuant to s. 696.3(3) of the *Criminal Code.*

Also on that date, the Crown offered no evidence and the charge against Mr. Assoun was dismissed for want of prosecution.

BACKGROUND PRECEDING THE JULY 2, 2019 APPLICATION

[9] On March 5, 2019, the CBC filed a Notice of Application to Appear in Crownside. The remedy was stated as "…to unseal documents in the Queen v. Glen Assoun". The matter was heard in Crownside on March 7 and again on April 4 when The Canadian Press and The Halifax Examiner joined the CBC as Applicants and the July 2 hearing was scheduled.

[10] On April 12, a recorded telephone conference was convened with the Court, parties and counsel for Halifax Regional Municipality (HRM) taking part. Counsel for the PPS volunteered to organize the Court file and an index of the Assoun file was produced soon thereafter.

[11] On May 17, the CBC, The Canadian Press and The Halifax Examiner (collectively, the Media) brief and book of authorities were filed.

[12] On June 6, a Consent Order was issued permitting HRM to become an Intervenor.

[13] On June 10, the AGC filed their brief and book of authorities along with affidavits (all deposed June 7, 2019) of Mark Green, Jared Harding and Roger Robbins. On June 11, the Court received the PPS's brief with appendices and authorities. On this date was also filed a brief, Notice of Application for sealing order and publication ban by Mr. Assoun. As well, the HRM filed their brief along with an affidavit (actually filed the day before) of Halifax Regional Police (HRP) Detective Justin Sheppard. Owing to email exchanges between my judicial assistant (JA) and HRM counsel, Detective Sheppard's affidavit was removed and ultimately replaced with his affidavit sworn June 18, 2019. On June 14, the Court received the Media's reply brief.

[14] On June 17, I had my JA email counsel as follows:

> Dear Counsel:
>
> Justice Chipman has reviewed the filed materials. Several of the briefs make references to redactions (e.g. para. 24 of Mr. Assoun's counsel's brief). He would ask for each party (with the exception of Mr. Coles' clients, as this obviously does not apply) to file by the end of this week, the documents they propose for redaction with the precise sections redacted.

> By making this request Justice Chipman is of the view it will focus the hearing; he wishes to be clear that the request in no way should be interpreted as a rejection of the media's position that all of the material (unredacted) be disclosed. This remains to be determined at the July 2, 2019 hearing.

[15] In the result, the Court received the following:

1. June 20, 2019 letter and Appendix A containing proposed redactions from Mr. Assoun; along with 2 amendments of Appendix A – the latest received June 30th.
2. June 21 letter and attachment received from HRM;
3. June 21 letter and attachment received from PPS; and
4. June 21 letter, chart and proposed redactions to the PA and appendices received from the AGC.

[16] In the covering letter from AGC, counsel requested as follows:

> We ask that this material not be filed as part of the court record. We are providing this at Justice Chipman's request to facilitate his review of the redactions being proposed by the AGC. A copy of our proposed redactions to the report will also be provided to those parties that have signed undertakings with the Criminal Conviction Review Group.

[17] On this point I will simply say that up until July 2, the entirety of the file inclusive of all material submitted on this Application was stored in my office and inaccessible to anyone but me. On July 4, pursuant to a request made on July 2, Mr. Assoun's counsel was permitted to review the Court file.

[18] Mr. Assoun's Notice of Application seeks an Order as follows:

> 1. Permanently sealing the current court record insofar as it specifically names and identifies three individuals, two of whom are currently incarcerated in federal custody, the third of whom would face grave danger if their name was made publicly available.
> 2. Permanently banning the publication of the names and indentifying information regarding these three individuals.

[19] Ten grounds are enumerated in support of the Application.

[20] In assessing the positions of the parties, it is clear that Mr. Assoun is the least aggressive of the four parties in opposition to the Media's position that the sealing

order and publication ban should be completely lifted. For example, Mr. Assoun states as follows in the first two paras. of his brief:

> 1. Mr. Assoun accepts that the material in this Court's file respecting this application for judicial interim release, and variations to his release order, should now be made accessible to the public. The rationale for the publication ban and sealing order put in place on October 23, 2014 is no longer applicable and the order itself appears to be spent in as much as the ministerial review has concluded and no judicial proceedings have arisen from it. Nor is there any convincing rationale now for a further order inhibiting public access the file. Mr. Assoun supports the application.
> 2. Ms. Assoun seeks a narrow exemption to the release of the file material and the lifting of the sealing order and publication ban. He requests that the material made available to the public not include the identity of three witnesses or any information that might tend to identify them. This request was communicated in a preliminary brief, dated April 11, 2019 and repeated in a conference call among counsel on April 12, 2019. Concurrent with the filing of this brief, on June 10, 2019, a formal application for a publication ban and sealing order regarding the identity of these witnesses is being lodged with the Court for release to Nova Scotia media outlets.

[21] The AGC says that the Media should only be permitted to receive a redacted PA and appendices and they have submitted their proposed redactions. The AGC says that the redacted version respects the open court principle while preventing "a serious risk to the administration of justice". They argue that granting the Media's request would constitute a serious risk to the administration of justice for six main reasons:

1. The PA contains information from vulnerable and marginalized individuals;
2. The PA contains information from persons who would have had no expectation their information would become public;
3. The PA contains unverified opinions;
4. The PA contains information that would likely be inadmissible;
5. Disclosure of the PA may jeopardize ongoing investigations; and
6. The PA contains privileged information.

[22] The PPS makes the point that the PA was provided subject to an undertaking prohibiting recipients from disclosing the information related to the Ministerial review. The PPS acknowledges that counsel and others, acting on its behalf, are

bound by the obligations imposed by the undertakings to CCRG as governed by the *Privacy Act*, R.S.C., 1985 c. P-21, independent of the Court's sealing order and publication ban.

[23] The PPS points out that the undertaking effectively prohibits dissemination in any manner, form or medium the content of the PA and its appendices, except in the following circumstances:

1. Information already in the public domain;
2. For review by the PPS and its agents; and
3. On written authorization of the federal AGC and the prior execution of an undertaking by anyone with whom the materials and/or information is to be shared.

[24] The PPS goes on to state it takes no objection to the unsealing of materials filed by Crown counsel in response to Mr. Assoun's original bail application and variations thereof, except where the materials implicate certain privacy interests.

[25] As for the position of Mr. Assoun, they assert:

> The request is unusual and unprecedented. It provides no evidentiary basis upon which the Court could assess, with confidence, the nature and extent of a realistic risk, if any. A *bona fide* risk assessment by a police agency qualified to carry out such a task would be a preliminary step. Further, these individuals were either deposed or filed an affidavit during the Ministerial review.

[26] Finally, PPS concludes their submission with these remarks:

> …, the same or similar interests (e.g. *bona fide* privacy interest, vulnerable persons, personal and professional reputations) that were the subject of Your Lordship's October 2014 decision, continue to be engaged and relevant. No formal route to challenge aspects of the investigative process and information existed for organizations, and person identified or identifiable in the CCRG materials. The sealed materials before the Court are not the final word on information that was before the Minister.

[27] As for the HRM, their submissions are focussed on the disclosure of HRP materials to CCRG. In their brief they offer this summary:

> The Preliminary Report and appendices contain approximately two dozen primary investigative documents (witness statements and officer notes) related to the homicide of Brenda Way ("the Way File") which HRP was obligated to share with the CCRG. In providing said documents, HRP in no way intended to waive its

> ownership of them or compromise its right to assert investigative privilege over them. HRM's position is that they should be redacted.
>
> The Way File is now an open, unsolved homicide file. While it is not an active investigation, it has the potential to become one should new evidence be obtained, or should new witnesses come forward. In such a case, the broad dissemination of witness statements, officers' notes and other police documents may unduly complicate the investigation.
>
> Lastly, the Preliminary Report contains a relatively small number of references to wiretap, interview and other sensitive police techniques, largely irrelevant to the Way File, the publication of which could jeopardize future investigations. HRM requests that, prior to any publication, these selections be redacted on the basis that public interest in their disclosure does not outweigh the public interest in their protection.

[28] In their reply submission, the Media say the opposing parties have raised arguments which are not sufficient to satisfy the elements of the *R. v. Mentuck*, 2001 SCC 76 test. In particular, they say:

> Counsel for the intervener acknowledges that there is no active / ongoing investigation into the homicide of Ms. Way. The suggestion that there remains an open file with the police on the matter, cannot in any way satisfy the *Mentuck* test so as to justify a Publication Ban / Sealing Order in respect to the material in the Assoun file.
>
> The Application for a Sealing Order and Publication Ban filed by counsel for Mr. Assoun is limited in scope to seeking permanent confidentiality protection for three witnesses. Counsel for Mr. Assoun provides argument to support this request in his brief, however, there is not evidence placed before your Lordship which can be weighed / challenged so your Lordship can properly exercise your discretion in respect to the issuance of the extraordinary Sealing Order and Publication Ban being sought by Mr. Assoun's counsel. The Applicant's commend your Lordship to paragraphs 43-59 of the Nova Scotia Public Prosecution Service's response brief.
>
> Whatever limitation the undertakings given by the defence and the Nova Scotia Public Prosecution Service place upon their use of the Preliminary assessment with appendices, as updated / supplemented: your Lordship is under no such restriction. The Court, and access to its records are presumed open to the media and the public. Neither the *Canada Evidence Act*, R.S.C., 1985, c. C-5, nor the *Privacy Act*, R.S.C., 1985 c. P-21, Section 8(2)(c) mandate nondisclosure by the Court. Even if they do have some application to the office of the Attorney General for Canada, the Court is not subject to the same constraints.

[29] In the main, the Media says that the opposing parties were initially of the view that the sealing order and publication ban should remain in force only until the Ministerial review and any judicial proceeding resulting therefrom were concluded.

They add that the original order (decision) was predicated on the ban / sealing order remaining in place until any judicial proceedings arising from the Ministerial review were over. They make the obvious point that the matter concluded on March 1, 2019. In the result, the Media says the rationale that may once have existed for the order has now evaporated. Accordingly, the Media makes these arguments:

> However, the Ministerial review process having concluded and the judicial proceedings flowing from the same being at an end, there are no witnesses whose evidence may [be] impacted by the release of the contents of the preliminary assessment, or other documents on file/transcripts. It cannot be said at this time that "…there is a real and substantial risk which poses a serious threat to the proper administration of justice…." Therefore, the situation is now akin to that in *Driskell* and it is submitted your Lordship should follow that decision.
>
> Your Lordship did not come into possession of the preliminary assessment and its' appendices pursuant to an undertaking such as those given by the public prosecution service and Assoun's counsel. The court did not receive the material on the basis that it merely 'hold' the material in a sealed file. Your Lordship read the material, and its contents, along with the Green Affidavit, where the basis for your granting the publication ban and sealing order in first instance.
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> …
>
> The Court controls access to its copy of the Preliminary Assessment and its appendices. Absent a specific sealing order/publication ban of the court records, particularly those relied upon in your judicial decisions, are to be public. The October 7 letter accompanying delivery to your Lordship of the Preliminary Assessment report cannot, in and of itself, alter the open court principle and *Rules*. In any event, as the request to return the documentation was restricted to the situation where the confidentiality orders being sought were denied or withdrawn, the letter is not relevant as the Application(s) was granted.

[30] In terms of the evidence before the Court on this Application, we have the aforementioned four affidavits. Mark Green is one of the AGC's affiants as he was when the CBC brought the original Application in 2014. Mr. Green is the author of the PA and he provides a host of reasons as to why certain information in the report and appendices should be permanently sealed. For example, at para. 7 he deposes:

> If our preliminary reports or investigative reports were to become public, if could stifle our work in future cases. It is entirely foreseeable that individuals and organizations would be far more hesitant to participate voluntarily in the Ministerial review process if our reports were released to the public. I believe that individuals would be more reluctant to speak openly regarding past events and that I would face new difficulties in securing access to documentation held by third parties. While the Minister of Justice has subpoena powers, I think organizations and

> individuals would resist the production of privileged or confidential material far more often if there was a risk it would become public.
>
> … the CCRG made the decision to allow Mr. Assoun to use a detailed preliminary assessment, which set out the reasons for moving to the investigative state of the review process, during his bail application. The future implications of this decision, including the difficulties in maintaining confidentiality, were not foreseen. While the criminal proceedings involving Mr. Assoun's alleged involvement in the death of Brenda Way have concluded, I continue to have concerns about the dissemination of my preliminary assessment.
>
> … The report and supporting appendices contain a large amount of personal and sensitive information regarding witnesses and potential witnesses that deserve protection. …. potential witnesses who may need to be interviewed or re-interviewed as part of a new criminal investigation will see or hear broadcasts about their earlier statements that will impact their evidence, thus the integrity of any future investigation.
>
> If the entire report and appendices are released without redaction, the identity of certain vulnerable witnesses who provided evidence implicating third parties would become public, putting their personal safety at risk.

[31] As for Sgt. Harding, he states:

> The preliminary report and appendices contain information collected by the RCMP and Halifax Regional Police via a joint operation initiated to investigate several unsolved homicides and missing person files. This information includes evidence implicating multiple individuals suspected of committing crimes for which no charges have been laid. If released I believe this information would jeopardize efforts to resolve those crimes by alerting certain individuals that they are suspects.
>
> In my review of the appendices and the report, I also noted information that appears to come from confidential informants. There is other information that comes from witnesses whose identities may require protection as they implicate others in unsolved crimes. Public disclosure of this information could put the safety of those parties at risk.
>
> I also noted information describing police techniques used, or being considered for use. Releasing this information would alert potential suspects and the public in general to the use of those tactics, thereby impeding their efficacy both in the open investigations and in future cases.
>
> The preliminary report and appendices also contain personnel records, including performance reviews, of a former RCMP officer. I do not believe this member would be aware of the inclusion of this information in the report and therefore unaware that their personal information may become public.

[32] The third AGC affiant, Corp. Robbins deposes:

> It is the RCMP's position that public disclosure of ViCLAS information, even disclosure of a blank booklet, would be injurious to this sensitive and extremely important investigative technique, as it would educate the criminal element about the types of behaviour we find particularly important.

[33] As for the Sheppard affidavit, he states that CCRG requests were fulfilled by the HRP and that the CCRG was given "access to privileged and sensitive documents to which the public would not generally have access". He adds that the CCRG "to the best of my knowledge" at no point advised that any of the provided documents would be made public". Det. Sheppard goes on to itemize 21 documents which:

> …discuss alternate suspects or persons alleged to be alternate suspects, all of whom are alleged to have committed serious criminal acts, including homicide. I believe that publication of this information may compromise or prejudice ongoing investigations.
>
> …
>
> …discuss sensitive police techniques, the publication of which could jeopardize the success of future similar operations.

LEGAL PRINCIPLES

[34] I refer to *R. v. Assoun*, 2014 NSSC 381 at paras. 35-41. In terms of the jurisprudence in the nearly five years since my decision, I would point to Justice Cromwell's words in *Endean v. British Columbia*, 2016 SCC 42 at para. 66:

> 66 The open court principle embodies "[t]he importance of ensuring that justice be done openly", which is "one of the hallmarks of a democratic society": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("*C.B.C. v. New Brunswick*"), at para. 22, quoting *Re Southam Inc. and The Queen* (No. 1) (1983), 41 O.R. (2d) 113 (C.A.), at p. 119; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 23; *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 31; and *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 1. As this Court has previously remarked, "[p]ublicity is the very soul of justice": *C.B.C. v. New Brunswick*, at para. 21, quoting *Scott v. Scott*, [1913] A.C. 417 (H.L.), at p. 477; *Vancouver Sun (Re)*, at para. 24; *Named Person*, at para. 31. And, as Wilson J. summarized in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1361, the open court principle is rooted in the need
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> > (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

[35] I also refer to (then) Justice Wagner's comments with respect to the open court principle in the same decision at paras. 83-91.

[36] In terms of recent Nova Scotia caselaw, I refer to the comments of now Chief Justice Wood in *Canada (Attorney General) v. Canada Revenue Agency*, 2018 NSSC 51 at paras. 1 and 2:

> 1 The open court principle is fundamental to public confidence in the Canadian judiciary. Courts and judges must do their work in a manner that is accountable and transparent. People are entitled to know what was decided and on what basis. Court secrecy is only permissible when a clear justification can be demonstrated.
>
> 2 This case raises the openness principle in the context of deciding when and to what extent the public is entitled to access court records. As is usually the case, the media is acting as representative of the public.

[37] I also refer to Justice Wood's helpful analysis at paras. 17 – 21 and 28 – 39 of the above case. Finally, I note Justice Beveridge's comments as follows in the opening para. of *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 58:

> Courts operate in the open. The public have a right to access court documents and be present in court to hear the evidence, arguments and judicial reasons. This is known as the open court principle. This common law principle is now constitutionally embedded as an element of freedom of expression, including freedom of the press and other media in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

ANALYSIS AND DISPOSITION

[38] I accept the Media's overarching position that the landscape has considerably changed in the nearly five years since the initial sealing order and publication ban was imposed. The criminal judicial process, *vis-à-vis* Mr. Assoun, came to an end four months ago. There will not be a future jury trial. The Crown offered no evidence and the charge was dismissed for want of prosecution. In the result, the transcripts and exhibits from the original jury trial of nearly 20 years ago, along with the subsequent sentencing hearing and the 2006 Court of Appeal hearing, should be within the public domain. I hereby order that they be unsealed and opened in their entirety.

[39] With respect to the PA and appendices, I have competing positions before me ranging from full disclosure to various forms of redaction. The parties resisting the

Media's application bear the burden; they must demonstrate that the redactions are necessary to prevent a serious risk to the administration of justice. Moreover, the salutary effect of any subsequent order requiring redactions must outweigh the deleterious effect on the rights and interests of the parties and public. Those rights include freedom of expression, freedom of the press and the efficacy of the administration of justice.

[40] In my decision to initially order a publication ban and sealing order I distinguished *R. v. Driskell*, [2003] M.J. No. 484 (Q.B.) at para. 55 as follows:

> 55 At first blush *Driskell* has like features to Assoun prompting the argument that the publication ban and sealing order should be denied. On closer examination, however, I believe *Driskell* is significantly distinct from the case at bar. In *Driskell* the only reason the applicant brought the motion to seal the police report was due to the undertakings given not to make it public. Accordingly, it is not surprising that Associate Chief Justice Oliphant found that rationale fell far short of making a convincing argument that a sealing order was necessary. Here, we have the above described Green affidavit along with the PA before the court. I have carefully scrutinized the Green affidavit within the context of the PA, which I have read. Taken together, for the reasons more particularly described below, I believe the applicants have satisfied their onus of producing sufficient evidence to persuade me that the requested sealing order and publication ban are appropriate. That is to say, I find that the PA and Green affidavit, taken together, form solid evidence that there is a real and substantial risk which poses a serious threat to the proper administration of justice such that the publication ban and sealing order are the only ways to prevent a serious danger from being avoided.

[41] In my original decision I went on to explicitly state that the "highly sensitive information" should not be revealed "at this stage of the proceedings." Of course, the stage of the proceedings in the fall of 2014 was long before the Ministerial review result and the ultimate decision of the Crown not to lead evidence on a new trial and the matter being dismissed for want of prosecution. Indeed, the most compelling reason for ordering the publication ban and sealing order was due to the prospect of a second criminal jury trial for Mr. Assoun. It was for that reason that *Driskell* was distinguished.

[42] Fast forward to the summer of 2019, and the AGC and HRM have marshalled rationale through their affidavits for the continuing basis for parts of the file to be kept from the public, which I have carefully considered. I have, of course, conducted this consideration in the context of the *Dagenais/Mentuck* test and am ever mindful of the open court principle and the fact that the parties opposing the Media's Application have the onus to keep anything from the public domain.

[43] In my view, the notion that the privacy or reputational interest of officials whose conduct may be exposed or even condemned should be protected ahead of the values embedded in the open court principle cannot be sustained. It is common for judicial proceedings to include detailed references to official malfeasance – including the naming of names which are made available to the public under the open court principle and are explicitly discussed in court judgments. Examples of cases where police or prosecutorial non-disclosure has been openly discussed and documented by the Supreme Court of Canada and appeal courts include: *R. v. Dixon*, [1998] 1 SCR 244; *R. v. Taillefer*, [2003] 3 SCR 307; *R. v. Ahluwalia* (2000), 149 CCC (3d) 193 (Ont. C.A.); and *R. v. Watt*, 2008 NSCA 25.

[44] I would add that I am most receptive to Mr. Assoun's argument as stated at para. 13 of his brief:

> Putting the proposition simply, a large amount of significant information lies beneath the terse decision of the Minister of Justice directing a new trial and the short proceedings which followed Mr. Assoun's arraignment on March 1 at which the Crown elected to call no evidence. That was a landmark event in his life, following sixteen and a half years of imprisonment and four and a half years on rigorous terms of bail. Yet as matters now stand, he cannot tell his own story. Nor can the public evaluate his claim of factual innocence or the reasons for the Minister's order, the Crown's decision and the Court's verdict. As a permanent state of affairs, this is not tolerable. It is not fair either to Mr. Assoun or the public. Accordingly, the Court should ensure that access is granted to the contents of its file as requested by the applicants.

[45] In my view, we have now reached a stage whereby the PA and appendices must be released. Mr. Assoun must be able to tell his story. The Media must be able to report on why the Minister made his decision and why the Crown had no evidence on the new trial. The public should know why Mr. Green said at the end of the PA that "there may be a reasonable basis to conclude that a miscarriage of justice likely occurred in your [Mr. Assoun's] case". Further, since the Minister of Justice said through his February 28, 2019 Order that there was "relevant and reliable information that was not disclosed to Mr. Glen Assoun during his criminal proceedings", the evidentiary foundation for this statement should be made public. To the extent that this may refer to official malfeasance is neither here nor there given the case authority.

[46] Moreover, my original Order has essentially lapsed according to its own terms since, after March 1, 2019, there is neither a Ministerial review underway nor will there be a criminal judicial proceeding arising from it. The 2014 judicial interim

release application was allowed and the materials formed the basis for an important decision of the Court granting bail to Mr. Assoun. It is now time for the evidentiary basis for the decision to be explored.

[47] Since there will be no future prosecution of Mr. Assoun and because the Ministerial review is over, it cannot be said witnesses' recollections and testimony are likely to be tainted by release of the sealed materials.

[48] The sole remaining issue is whether the Court should redact references to the names and identifying information of two witnesses from material in the PA and Court file. Mr. Assoun's counsel originally identified three witnesses, as follows:

- A career criminal who provided information about communications in custody with a third-party suspect and who was interviewed by counsel for the CCRG.
- A person serving a life sentence who provided information about conversations with a third-party suspect and was interviewed by counsel for the CCRG.
- A person with information about the place of residence of the third-party suspect who provided an affidavit to the CCRG.

[49] At the close of the July 2 hearing, I reserved judgment on this aspect of my decision and asked for briefs from Mr. Assoun and the PPS. In Mr. Assoun's brief he noted:

> Our submissions to this point have referred to three witnesses whose identities should be protected. Following counsel's review of the Court's file on July 4, 2019, we are satisfied that no information capable of identifying the third witness will be revealed by lifting the sealing order. We are also satisfied that no documents other than those previously identified require redaction if our submissions are accepted.

[50] In the result, I have considered Appendix A, the chart of redactions proposed by Mr. Assoun's counsel, as pertaining to two witnesses.

[51] In addition to reviewing Mr. Assoun's brief filed on July 5, I also considered the authorities he referenced and the two references handed up during Mr. Campbell's argument from last day:

1. *Toronto Star Newspapers Limited et. al. v. Her Majesty the Queen in Right of Canada*, 2005 CanLII 47737 (ON SC); and

2. *Interrelated Police Investigations and Disclosure*, 2011 CanLIIDocs 179 (Grace Hession David)

[52] As for the PPS, I am mindful of Mr. Scott's oral argument from July 2 along with the PPS brief, 10 cases and article submitted on July 5.

[53] The gist of Mr. Assoun's argument for the redactions is that disclosure of the two witnesses' identities would constitute a potential serious threat to them. They say that the potential threat to the two witnesses is a serious risk to the administration of justice which outweighs the open court principle.

[54] As for the PPS, apart from stating a permanent sealing order and publication ban is not available on the motion, they assert that there is no evidentiary basis to justify the requested anonymization.

[55] Through the course of their arguments, Mr. Assoun's counsel submits that a judge, situated such as I am, can act on a summary of counsel of relevant facts and that affidavit evidence is not practical or required. They add that there is no rule in the caselaw applying the *Dagenais/Mentuck* test that dictates a certain kind of evidentiary record or analytical approach. At pp. 3-4 of their brief, Mr. Assoun asks the Court to focus on what is in the record; namely:

- The two witnesses gave evidence in support of the proposition that the third party suspect beat, strangled and cut the throat of Brenda Way.
- Their evidence is supported by the suspect's documented history, his specific modus operandi, his admitted proclivities, his whereabouts at the time of the murder, and a unique feature of his favoured footwear. Together, it suggest that he is an extremely dangerous man and a very good suspect in the killing of Ms. Way.
- The third party suspect's criminal record includes a murder in custody. It includes the murder of a victim to prevent her from being a witness. It includes a deceitful attempt to blame a partner in crime for a murder that he performed personally. The notion that, if he could find a way, this man would murder a witness against him, in or out of prison, is real, not speculative.
- We do not know his reach, either within the prison system or on the street, personally or through agents. We also do not know if, frustrated in a desire to take vengeance on one of the witnesses personally, he would take it on an ally or inmate of the witnesses. Nor are these risks which can be effectively evaluated by an expert – if such risks were amenable to precise evaluation, the suspect's most recent murder victim would not have been sharing a cell with him.

[56] The brief concludes with this pitch:

> The Court has enough information to make a decision. It also has an unquestionable jurisdiction to act on that information. We urge the Court to remain focused on the *Mentuck* test rather than on alleged procedural shortcomings or misplaced and alarmist arguments about the consequences o the order in other hypothetical cases. In this king of context, a risk to witnesses is almost always relatively low and incapable of precise quantification. But the consequences of ignoring or miscalculating the risk are potentially dreadful and sometimes fatal. This makes it the kind of risk that can justify a limited intrusion on freedom of expression, as many cases illustrate. If the salutary effect of protecting witnesses outweighs the inimical effect of redaction on free expression, the order should go as requested.
>
> In this case, what the Crown posits will be sacrificed by granting the order is amorphous and speculative. The order would constitute a negligible interference with the values secured by s. 2(b) since the substance of the evidence will still be made public. The case for redaction is the existence of a small risk of catastrophic harm. The case for refusing redaction is a certain risk of minimal harm. As the law illustrates in its solicitude for safety of confidential informants, the priority in balancing risks of this nature should generally be the avoidance of catastrophe.

[57] The PPS arguments may be distilled as follows:

1. There was no "well-grounded evidence" (indeed no evidence at all) of a "real and substantial risk" to the safety of these witnesses since they provided information in 2012;
2. Without a proper evidentiary record, the Court is unable to assess the availability of other reasonable alternatives and seek to "restrict the order as far as possible without sacrificing the prevention of the risk";
3. There was/is no evidence that these witnesses sought and/or were assured secrecy when they met with counsel for Mr. Assoun or counsel for the CCRG;
4. There is not a scintilla of evidence suggesting that either of these individuals were concerned for their safety. Presumably had that been so, it would be reflected in their interviews and/or noted within the Preliminary Assessment and reported to correctional authorities or a police agency in discharge of counsel duties;
5. This was not an instance of inmates cooperating with authorities, such that a "rat" moniker would be accurate;
6. One of the two now named persons is no longer in jail or known to be in conflict with the law. Further, having been released from prison, no reports have been received by police agencies of threats or violence to their person or property related to giving information in 2012;

7. The other named person has a publicized track record of being a jailhouse informant for the Crown since the 1990s, and has survived with seemingly no meaningful consequence as a result of that involvement, or since 2012, when he assisted Mr. Assoun's application. He is also convicted of murdering his cellmate;

8. David Carvery, a jailhouse informant in the trial of Glen Assoun, neither sought nor received any such protection;

9. The nature of a confidential informer is such that there is no applicable analogy between the protections afforded to such individuals and what the Applicant seeks for an in-custody informant or witness;

10. Confidential informers are protected because they assist investigations and are not witnesses. Their information cannot form an evidentiary basis for a conviction or acquittal, absent innocence at stake when their identity is disclosed and they become witnesses; and

11. Indeed, such protection sought by Mr. Assoun would create a dangerous precedent for significant mischief to the truth-seeking functions of courts and Ministerial reviews.

[58] I have carefully considered the competing arguments in arriving at my decision. It bears emphasis that the onus on a witness seeking anonymity is a significant one. While I am not prepared to establish an absolute rule, I have no hesitation in stating that if witness anonymity is sought, one would normally expect affidavit evidence to establish the evidentiary foundation. We do not have such a foundation here. While the Court is well acquainted with the background, certainly respects Mr. Assoun's counsel (if for no other reason because of their tremendous work on this file), and is incredibly mindful of the import of their submissions, I have determined that the case has not been made for the Court to take the step of granting the requested redactions. This is particularly so when one considers the open court principle and the various points advanced, in the specific by the PPS and in the main by the Media.

[59] In making my decision I am particularly mindful of the authorities cited by PPS; for example, *R. v. Sipes*, 2011 BCSC 1329 and Justice Smart's review of the submitted evidence in that case at paras. 89 – 139.

[60] In the result, I have determined that the redactions sought by Mr. Assoun shall be denied. The entirety of the file will be open for viewing inclusive of the PA and appendices.

[61] In conclusion, it is time that the surrogates of the public, the Media, be granted the opportunity to review the complete file. The Media have satisfied me on this

Application that the open court principle requires scrutiny of the materials that help to explain why a man convicted by his peers in 1999 was exonerated by the Minister of Justice twenty years later.

[62] The investigation that had to be protected for a time is now complete. Members of the general public must be able to appreciate why relevant and reliable information was not disclosed to Mr. Assoun when it should have been. The public should be able to appreciate why bail was granted. They must be able to see why the Minister made his decision. The public has the right to know why the Crown led no evidence at the new trial and why the second degree murder charge was dismissed. It is in the interest of Mr. Assoun and the general public that Mr. Assoun's story be told. The open court principle compels me to lift the order and release the complete court file.

COSTS

[63] In all of the circumstances, I decline to award costs on this Application.

Chipman, J.